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IN THE

Supreme Court of the United States

OCTOBER TERM 196#

No. 1018

A. G. V. ASSOCIATES, INC.,

Petitioners,

—against—

JEREMIAH F. CROSS, Trustee of 716 Third Avenue Holding Corp., Bankrupt,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Of Counsel.

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Supreme Court of the United States

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner respectfully asks this Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit which reversed and remanded for rehearing by Referee.

The Opinion Below

The opinion of the United States Court of Appeals, Second Circuit, has not yet been officially reported. A copy of the opinion is hereto annexed as Appendix A (pages A1-A11, *infra*).

Statement of Grounds of Jurisdiction

1. The Judgment of the United States Court of Appeals, Second Circuit, was rendered on December 31, 1964. No reargument was had.

2. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U. S. C Section 1254, and pursuant to Section 24C of the Bankruptcy Act, U. S. Code, Title 11, Chapter 4, Section 47.

Questions Presented for Review

1. Where the Trustee in Bankruptcy failed to sustain the burden of proof, and the Referee has dismissed his petition, said dismissal having been affirmed by the District Court, did the Court of Appeals abuse its discretion in remanding the case for renearing by the Referee, with a direction to the Referee to take additional testimony?

2. After a final judgment of dismissal, does the Court of Appeals have jurisdiction to direct the taking of further testimony, under the provisions of Section 24A of the Bankruptcy Act?

3. Did the Court of Appeals abuse its judicial function by reversing the Referee and the District Court, in the absence of a finding that such decision was "clearly erroneous"?

Statement of the Case

The Respondent, Trustee in Bankruptcy, petitioned the Referee in Bankruptcy for a declaration that an assignment of a leasehold by the Bankrupt was null and void, and for a declaration that the said assignment was in effect a mortgage on the leasehold. The four claims made by the Respondent were dismissed by the Referee, upon appropriate findings of fact and conclusions of law made by the Referee.

The Bankrupt's sole asset was a long term lease of a one story building located in New York City. A restaurant which sublet part of the leasehold, was operated by a corporation affiliated with the bankrupt corporation. Both the restaurant corporation and the Bankrupt were in financial stress. The restaurant corporation was in default in payments due under a chattel mortgage for fixtures purchased from Varveris, Inc.; the Bankrupt was in default in payments due its major landlord, and in payments of taxes and other charges payable under the major lease. Under these circumstances, on May 12, 1962, the Bankrupt agreed to assign the entire leasehold to Varveris, Inc., in return for payments by the latter of $22,000.00. Part of these funds were used to pay delinquent taxes and accrued rental and security due under the major leasehold; part of these funds were used to pay other obligations of the Bankrupt; part of these funds were used to pay obligations of the restaurant corporation, and the balance of these funds was to be paid directly to the Bankrupt. The agreement further provided that the Bankrupt could repurchase the leasehold within nine (9) months, for the sum of $17,800.00, plus interest, in which contingency, an accounting would be had for any profits received during the period of the possession of the lease, or any losses during such period. Varveris, Inc. assigned its rights under the assignment agreement referred to, to the Petitioner herein. On May 24, 1962, the assignment transaction closed between the Bankrupt and the Petitioner; on June 28, 1962, an involuntary petition in bankruptcy was filed against the Bankrupt, and six months later, on December 28, 1962, it was adjudicated a Bankrupt. On February 8, 1963, and within the nine (9) months period provided by the agreement, the Respondent notified Petitioner of his intention to repurchase the leasehold; no tender of money was made, and it was conceded at the hearing that the Respondent did not have on hand any sum of monies with which to complete the repurchase.

On February 18, 1963, the Respondent brought a proceeding against the Petitioner before the Referee, asking for a declaration that the assignment of the leasehold was a fraudulent conveyance under 11 U. S. C., Section 107; that the recordation of the assignment was void; that the assignment was void for want of proper stockholder's consent; and that the assignment was a mortgage rather than an absolute conveyance. All four of the claims were dismissed by the Referee after a three day hearing, for want of adequate proof, the Referee saying (on page 214 of the transcript of testimony, submitted in the original return):

> "The Referee: I have already dismissed the third cause of action, and I now dismiss the first, second, and fourth causes of action. In other words, your complaint is dismissed for failure of proof."

The Referee found, as his first finding of fact, that the Bankrupt sold the lease to the Petitioner, and as a second finding of fact, that there was an option to repurchase the lease; and found, as his sixth finding of fact, that the Bankrupt was not rendered insolvent by virtue of the transaction. The Referee's conclusions of law were that the transaction was an outright sale and assignment of the lease (first conclusion); that there was no debt on the part of the Bankrupt required to be repaid (third conclusion); that the option had not been exercised by the Bankrupt (fourth conclusion); and that the Respondent "failed to meet his burden of proof upon any of the claims set forth" (eighth conclusion). (Appendix "D", *supra*.)

Respondent petitioned the District Court for review, which came on for hearing before Judge Bryan. The learned Judge went into each claim raised by the Respondent and found, specifically, that with regard to each of the four claims, the Respondent failed to establish any of his claims, and that the Referee was correct in dismissing the petition. Judge Bryan affirmed the order of dismissal. (The complete decision is reported in Appendix "B" hereof.)

Respondent appealed to the Circuit Court, Second Circuit, and argument was had before Chief Judge Lumbard and Circuit Judges Hays and Anderson. The decision by Judge Anderson, although conceding (at page 565 of the published decision) that the burden of proof was on the Respondent, that such burden must be sustained by clear and convincing proof, and that a finding of the Referee that the burden was not sustained will be affirmed, unless clearly erroneous, found that there was "a crucial omission" as to the fair market value of the leasehold (page 568 of the reported decision). There were other areas in which the Circuit Court found the record to be unclear, to which other areas the Court attached less importance. Relying upon such failures of testimony in the transcript, the Circuit Court remanded the matter for rehearing by the Referee, and reversed for such purpose.

The Circuit Court ignored the Referee's apparent total disbelief of the expert witness, which was commented on by Judge Bryan on page 271 of his decision. The Circuit Court also disregarded the finding of the District Court that "the evidence as to the true nature of the transaction was conflicting" (page 271 of Judge Bryan's decision).

Reasons for Granting Writ

This case raises serious and important questions:

1. Where both the Referee and the District Court find that the Respondent failed to meet the burden of proof and dismiss Respondent's petition, ought or indeed may the Court of Appeals remand the matter for the purpose of taking additional testimony? Section 24a of the Bankruptcy Act (U. S. Code, Title 11, Chapter 4, Section 47), invests Courts of Appeals with Appellate Jurisdiction in Bankruptcy matters, "to review, affirm, revise, or reverse, both in matters of law and matters of fact." It is respectfully submitted that the Court of Appeals here did none of these.

It found, instead, a paucity of factual content in the testimony, and remanded for the purpose of taking additional proof. This, in light of a full trial before the Referee in Bankruptcy, following which the petition was dismissed for failure of proof, is not warranted by the mandates of Section 24 of the Bankruptcy Act. Further, that same Section provides "that the jurisdiction upon appeal from a judgment on a verdict rendered by a jury shall extend to matters of law only." Here, it is respectfully submitted, that had the Court of Appeals found the Referee's decision to be erroneous as a matter of law, requiring reversal, the Court of Appeals would have had such jurisdiction; but to find instead that there was insufficient proof presented, and requiring a further hearing to be held by the Referee, is contrary also to that latter provision of the section of the Bankruptcy Act.

Indeed, every losing Petitioner could ask the Appellate Court to grant a further hearing, since the Petitioner himself did not present sufficient facts to the original trier; and on the strength of the Court of Appeals decision in the case at bar, such request would be granted. This is not the case where a Trial Court limited a Petitioner's right to present evidence. Indeed, the evidence here, transcribd, took 214 typewritten pages. The factual findings of the trier of facts, especially where affirmed by the District Court, must be upheld.

There are myriad decisions by this Court, acknowledging the "clearly erroneous" rule. This Court in *Guzman* v. *Pichardo*, 369 U. S. 698, 82 S. Ct. 1095, reversed the Court of Appeals, which in turn had reversed the District Court. This Court relied upon the language in *United States* v. *U. S. Gypsum Co.*, 333 U. S. 364, 58 S. Ct. 525, 92 L. Ed. 746, wherein the Court said: "Under this rule, an appellate court cannot upset a trial court's factual findings unless it 'is left with a definite and firm conviction that a mistake has been committed'." Also, at page 702 of the *Guzman* case,

the Court said: "The determination of the factual content of ambiguous testimony is for the trial court, and such determination can be set aside on revue only if 'clearly erroneous.' *United States* v. *National Association of Real Estate Boards*, 339 U. S. 485, 495-496 (1950)."

Another case in which this Court reversed the Court of Appeals, which had previously reversed the District Court, is that of *Sentilles* v. *Inter-Caribbean Shipping Corp.*, 361 U. S. 107, 4 L. Ed. 2d 142, 80 S. Ct. 173. The Court there relied on its decision in *Tennant* v. *Peoria & P.U.R. Co.*, 321 U. S. 29, 88 L. Ed. 520, 64 S. Ct. 409.

2. Unless "clearly erroneous" the decision of the Referee, affirmed by the District Court, must stand.

Rule 52a of the Federal Rules of Civil Procedure (28 U. S. C. A.), indicates clearly that "* * * Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses * * *."

The fact that an Appellate Court might have found differently from the Trial Court, is not material in an appeal. As long as the Trial Court acted within the discretion permitted it, its judgment should stand (9 Am. Jur. 2d, Section 1703, at page 1196).

The various circuits are in agreement as to this general statement, all holding that in the absence of a clear showing of mistake, or in the absence of a showing that the Trial Court's determination was clearly erroneous, the Trial Court's determination, especially where affirmed by the District Court, will stand. See, for example, *in re B-F Building Corp.*, 312 F. 2d 691, 6th Circuit, (1963); *in re Plonta*, 311 F. 2d 44, 6th Circuit (1962), relying upon the *Commissioner of Internal Revenue* v. *Duberstein*, 363 U. S. 278, 80 S. Ct. 1190, 4 L. Ed. 1218); *Hilliard* v. *Hollins*, 290 F. 2d 263, 6th Circuit (1961); *Mazer* v. *United States*, 298 F. 2d 579, 7th Circuit (1962); *Chichester* v. *Golden*, 321

F. 2d 250, 9th Circuit (1963); and *American National Bank of Denver* v. *Rainguet*, 323 F. 2d 881, 10th Circuit (1963).

Indeed, even the Second Circuit, with three different Judges presiding (Judges Swan, Moore, and Smith), held, in the case of *In re G. E. C. Securities*, 331 F. 2d 655 (May, 1964), at page 656: "Where the District Court has affirmed the Referee's rulings, the concurrent findings will not be upset unless clearly erroneous. *Simon* v. *Agar*, 2 Cir., 299 F. 2d 853. They were not clearly erroneous. Order affirmed."

And it is respectfully submitted, that implicit in the Court of Appeals direction for a remand, for the purpose of taking additional testimony to clarify the record, that the decision below was not clearly erroneous; for if the decision were clearly erroneous, it was the obligation of the Court of Appeals to reverse the District Court, and not to remand for further testimony. As has been previously urged, the Court of Appeals did not have the right to remand for further testimony, in the light of Section 24a of the Bankruptcy Act, cited earlier.

3. Petitioner submits that the Court of Appeals in this case was too prone to direct the taking of additional testimony, disregarding completely the Referee's function as the trier of the facts.

Where testimony of a witness is so improbable, self-contradictory, and lacking in proper foundation, the Trial Court has the undisputed right to disregard it. 88 C. J. S., Section 214d, page 491. The right of the trier of facts to determine the credibility of witnesses is omnipresent. (*LaRose* v. *Cashio*, 330 F. 2d 269, 5th Circuit (1964); *Jue* v. *Bass*, 299 F. 2d 374, 9th Circuit (1962).

Nor could the Court of Appeals go outside of the record, or as its ruling suggests, direct that the record be enlarged to take care of any missing portions of testimony. This was the decision in the cases of *Briskin* v. *White*, 296 F. 2d 132,

and *Fortner & Perrin, Inc.* v. *Smith,* 327 F. 2d 801; in the *Fortner* case, the Court said, at page 809: "In a bankruptcy case, the scope of this Court's review is limited to the record, and to that which was presented below. *U. S.* v. *Gogin* (9 Cir. 1951), 187 F. 2d 530."

4. Finally, it is respectfully submitted that, the Respondent having failed to meet the burden of proof, the petition was properly dismissed. The moving party, the Respondent herein, had the burden of proving the allegations of his petition. Having failed to prove the necessary elements of his petition, it was properly dismissed. *In re La Press,* 310 F. 2d 895, 2nd Circuit (1962).

The failure of the proof to provide sufficient testimony concerning any, or all, material allegations, may not be met by remanding the matter for further hearing. Instead, the petition should be dismissed, and such dismissal should be affirmed on appeal. The Court's attention is respectfully directed to the language of the decision of the Court of Appeals for the 5th Circuit, in the case of *Lawrence Warehouse Co.* v. *McKee,* 301 F. 2d 4 (1962). There the Court said, at page 6: "This case turns on whether or not the commodities on which the lien was claimed were deposited with the warehouseman within the meaning of the Florida Statute under which the lien was claimed. Appellant substantially asserted the affirmative of the issue and thus had the burden before the referee of showing facts entitling it to the lien * * *. The finding of the referee is buttressed by the denial of the petition to review by the District Court. *Gunzburg* v. *Johannesen, Trustee,* 5 Cir., 300 F. 2d 40; General Orders in Bankruptcy, 36 and 47, 11 U. S. C. A., following Section 53; Rule 52(a) Fed. R. Civ. P., 28 U. S. C. A. and 2 Collier, Bankruptcy, Section 39.16 at page 1473. * * * The finding of the Referee of no deposit was not clearly erroneous on the record before us, *which is barren of evidence* of storage or deposit. * * * Appellant failed to carry the requisite burden of showing the deposit and thus

the judgment appealed from must be and is Affirmed." (Emphasis supplied.)

5. Rule 19 (1) (b) of the Supreme Court Rules indicates generally the motivating factors that the Supreme Court will consider in determining whether to grant a writ. In addition to granting a writ in cases involving important State or territorial questions, the Rule states that writs should be granted "where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter * * * or has decided an important question of federal law which has not been, but should be settled by this court; or has decided a federal question in a way in conflict with the applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision." It is respectfully submitted that the instant case falls into all of the situations quoted above in the rule.

CONCLUSION

FOR THE FOREGOING REASONS A WRIT OF CERTIORARI SHOULD BE GRANTED TO REVIEW THE JUDGMENT OF THE UNITED STATES COURT OF APPEALS, SECOND CIRCUIT. THE SAID JUDGMENT SHOULD BE REVERSED.

Respectfully submitted,

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APPENDIX A

(Opinion by Court of Appeals, Dated December 31, 1964, Reversing Judgment of District Court and Remanding to Referee for Rehearing)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

—o—

No. 52—September Term, 1964.

(Argued October 9, 1964 Decided December 31, 1964.)

Docket No. 28860

In the Matter of

716 THIRD AVENUE HOLDING CORP.,

Bankrupt,

JEREMIAH F. CROSS,

Trustee-Appellant,

—v.—

A. G. V. ASSOCIATES, INC.,

Respondent-Appellee.

Before:

LUMBARD, *Chief Judge,*
HAYS and ANDERSON, *Circuit Judges.*

—o—

Appeal by Trustee in Bankruptcy from judgment of the United States District Court for the Southern District of New York, Frederick vP. Bryan, *J.*, confirming order of Referee in Bankruptcy dismissing Trustee's petition to have conveyance declared a mortgage. Reversed and remanded for rehearing by Referee.

JACOB OLINER, Esq., New York, N. Y., *for Trustee-Appellant.*

SAMUEL NEWFIELD, Esq., New York, N. Y. (Bernard Finkel, Esq. on the brief), *for Respondent-Appellee.*

—o—

ANDERSON, *Circuit Judge*:

The Trustee of the Bankrupt appeals from a judgment of the District Court which affirmed the dismissal by the Referee in Bankruptcy of the petition of the Trustee which sought a declaration that an assignment by the Bankrupt of a leasehold was null and void or, in the alternative, a declaration that the assignment was a mortgage, and a determination of the amount required for its redemption. 225 F. Supp. 268 (S. D. N. Y. 1964). We reverse and remand for rehearing by the Referee.

The Bankrupt, 716 Third Avenue Holding Corp., was a realty corporation whose sole asset in 1962 consisted of a thirty-three year lease[1] of a building containing two stores and a restaurant at Third Avenue and 45th Street in New York City. The restaurant was occupied by the Two Johns Restaurant Corp. which was experiencing serious financial difficulty. Two Johns owed the Bankrupt approximately $20,000 in rent, and its imminent collapse threatened the Bankrupt with the loss of the major portion of its rental income under the subleases and, in consequence, the possible forfeiture of the leasehold to the fee owner.

On May 12, 1962 th Bankrupt agreed in writing to assign the entire leasehold to Varveris Inc. in return for $22,000 and to use the proceeds as follows: $4500 for de-

1 §290 (subdivision 1) of the New York Real Property Law provides: "The term 'real property', as used in this article, includes lands, tenants and hereditaments and chattels real, except a lease for a term not exceeding three years."

linquent real estate taxes on the property; $1000 for the May rent owed by the Bankrupt to the fee owner; $2500 for attorneys' fees, including those of the assignee's attorney; $5000 to pay the conditional sales obligations of the Two Johns; $3000 to provide additional security for the fee owner; and the remaining $6000 for the Bankrupt's use. The agreement contained an option, to run for a period of nine months from the date of the assignment, under which the Bankrupt could repurchase the leasehold for $17,800 plus 6% interest. If this right were in fact exercised, it was agreed that the assignee would account for any profits received during the period but all losses incurred would be added to the repurchase price.

The only other provision of the agreement which is of significance on this appeal is the strong sanction imposed upon the assignee if, during the option period, it allowed to remain unpaid for twenty days either the rent due to the owner of the land and building or the taxes on the leased premises. If either of these events occurred, the assignee was to lose all of its interest in the lease and all "right to repayment" for the assignment. The reassignment, executed by the assignee and held in escrow pending exercise of the option, would, in the event of such default by the assignee, be delivered to the assignor.

Before the execution and delivery of the assignment Varveris transferred all of its rights under the agreement to the appellee, A. G. V. Associates, Inc. The agreement of May 12, 1962 was carried out on May 24, 1962 by the assignment of the leasehold to A. G. V., which contemporaneously executed a reassignment to the Bankrupt. Both instruments were delivered to A. G. V.'s attorneys to be held by them in escrow. On August 29, 1962 the assignment was recorded but the reassignment was not.

In the meantime, however, an involuntary petition in bankruptcy had been filed against 716 Third Avenue Hold-

ing Corp. and on December 28, 1962, it was adjudicated a bankrupt. A month later, and still within the nine-month period stipulated in the May agreement, the Trustee in Bankruptcy notified A. G. V. of his intention to repurchase the leasehold, but there was no tender of funds because the Trustee did not have on hand enough money to meet the repurchase price. On February 18, 1963, the Trustee initiated the proceedings which are the subject of this appeal.

There are four points raised by the appellant: (1) that it was error to hold the assignment of the leasehold to be an absolute sale because the evidence before the Referee clearly established that a mortgage transaction was involved; (2) that the recordation of the assignment was void under § 320 of the New York Real Property Law; (3) that the assignment was void under either § 16 or § 20 of the New York Stock Corporation Law for want of the required stockholder consent; and (4) that the assignment was without fair consideration and rendered the Bankrupt insolvent, and therefore was a fraudulent conveyance.

The most important of these questions is the first, that is, whether or not the transaction was, what on its face it appeared to be, an assignment of a lease for a consideration of $22,000 with an option to repurchase within a nine months period, or was instead a loan of $22,000 with the lease transferred to the lender for security pending repayment of the money advanced by the exercise of the so-called option. If the former, the option has expired, unexercised, and title to the lease has become absolute in the assignee. If the latter, title has not so vested, and the debtor has a right to redeem.

The appellee has argued that, because the option period under the agreement has expired, the appellant could no longer repurchase the lease in any event, but if the transaction is a mortgage, the redemption period is provided by law and cannot be abolished or limited by agreement or

action of the parties. *Conway's Executors and Devisees* v. *Alexander*, 11 U. S. (7 Cranch) 218, 241 (1812); *Mooney* v. *Byrne*, 163 N. Y. 86, 57 N. E. 163 (1900).

The Referee found that there was no debt as a result of the assignment and the payment of the money and that, therefore, it was not a security transaction but an outright sale with an option to repurchase.

The District Court felt bound to affirm the Referee's order in the light of certain principles applicable to this kind of case: first, that the burden of proof is on the party asserting that a conveyance absolute in its terms is a mortgage, *Charles T. Streeter Construction Co.* v. *Kenny*, 209 App. Div. 697, 205 N. Y. Supp. 611 (1st Dept. 1924); second, that he must sustain that burden by clear and convincing proof, *Zivotosky* v. *Max*, 190 Misc. 1044, 75 N. Y. S. 2d 553 (Sup. Ct. 1947), aff'd 276 App. Div. 792, 92 N. Y. S. 2d 631 (3rd Dept. 1949); and third, that a finding by the Referee that the burden was not sustained will be affirmed unless clearly erroneous, *In re Madelaine*, 164 F. 2d 419 (2d Cir. 1947).

There was a paucity of oral testimony directly on the nature and purpose of the transaction. The witness Vlahakis, president of the debtor, was apparently a difficult witness because of his limited understanding of English. He testified that the dealings of the parties were not a sale but a loan. The respondent offered no evidence on this issue.

In his opinion Judge Bryan recognized, however, there were a number of features of the assignment agreement and the implementing documents which tended to show that the parties intended this to be a security transaction. One was the fact that, out of the disbursements agreed to be made by the assignor, $3000 was to be used as additional security for the fee owner. There was no provision for the return to the assignor of this sum, or any part of it not

used for covering a default in the obligations of the building owner's lease, unless the option was exercised. Another was the provision that the assignee was to account to the assignor for any profits during the so-called option period and that losses were to be charged to the repurchase price, in the event that the option was, in fact, exercised. This could imply that the assignee's possession was more constructive than real. The repurchase price for the leasehold under the option was substantially the same as the money advanced to the debtor ($22,000), less approximately the $4200 paid out of that money to Varveris Inc. in payment of the indebtedness of Two Johns Restaurant for fixtures.

A provision which the district judge did not mention was the unusual sanction imposed upon the assignee to protect the assignor against a forfeiture of the leasehold or the encumbering of it, during the option period, through non-payment by the assignee of the rent to the owner of the building or the non-payment of taxes; in either event the lease would automatically revert to the assignor without further obligation on its part.

Indeed, the very existence of an option to repurchase, executed contemporaneously and held in escrow, is an indication that the parties intended that the assignor would be able, as they said, "to repurchase" its leasehold. *Matthews* v. *Sheehan,* 69 N. Y. 585 (1877). See generally: 3 Powell, *Real Property,* § 447 at 577-583 (1952); Fogelman, *The Deed Absolute as a Mortgage in New York,* 32 Fordham L. Rev. 299 at 307-308 (1963).

The Referee, however, decided the case summarily from the bench in favor of the respondent on the ground that there had been a failure of proof by the petitioner-trustee. Later he filed a memorandum of decision containing findings of fact and conclusions of law. The conclusion that there was no debt was predicated upon two of the findings, (a) that neither the agreement itself, nor any of the ex-

hibits which were admitted in evidence, mentioned the existence of a debt or obligation, and (b) that there was no "promissory note or other evidence of debt . . . given by the bankrupt to the respondent . . ." Although one of the conclusions of law stated, "The trustee's proof failed to establish that a debt or obligation . . . was created as a matter of law . . .", the only findings of fact upon which this and the other general conclusions of law, holding the assignment to be an outright grant, could be based are those mentioned.

It is well settled in New York that the existence of a debt is fundamental to establishing a conveyance as a security device. *Bascombe* v. *Marshall*, 129 App. Div. 516, 113 N. Y. Supp. 991 (2d Dept. 1908), aff'd, 198 N. Y. 538, 92 N. E. 1077 (1910); *In re Exterior Street*, 168 Misc. 575, 6 N. Y. S. 2d 110 (Sup. Ct.), aff'd, 255 App. Div. 767, 7 N. Y. S. 2d 643 (1938). The Referee decided there was no debt, not because the amount which the debtor would have to pay to redeem was not mathematically computable, for he found it to be precisely $26,912.56, but because there was no written instrument stating that a debt or obligation existed. But the pertinent question is whether or not a security transaction was intended, 5 Tiffany, *Real Property*, § 1394 (1939), and for this purpose parol evidence is admissible as well as any writings bearing upon the issue and the reasonable inferences to be drawn from both sources. *Peugh* v. *Davis*, 96 U. S. 332 (1878); *Horn* v. *Keteltas*, 46 N. Y. 605, 609-610 (1871); *Ensign* v. *Ensign*, 120 N. Y. 655, 24 N. E. 942 (1890); *Zivotosky* v. *Max*, *supra*; and *Chase Nat'l Bank* v. *Tover*, 245 App. Div. 615, 283 N. Y. Supp. 832, aff'd, 271 N. Y. 518, 2 N. E. 2d 674 (1935).

It is not necessary to support a finding that a transaction constitutes a mortgage that the trier first be satisfied that there existed a personal promise or covenant on the part of the grantor or mortgagor to repay. *Horn* v. *Ketel-*

tas, supra. Section 249 of the New York Real Property Law recognizes this in specifically providing that a mortgage does not imply a personal covenant to pay the sum intended to be secured, and it further provides that in that event, the remedy is confined to the property conveyed as security. This often occurs where the grantor or mortgagor has no personal financial resources other than the real estate conveyed, and the lender requires that the value of the property be greatly in excess of the sum advanced because it is his only recourse. *Mooney* v. *Byrne, supra.*

The findings of the Referee show that he considered the absence of an express written statement of a debt was completely determinative and that it was unnecessary to deliberate upon the evidence on the key issue in the case, and he made no findings with respect to it. A trier does not, of course, have to make a finding with respect to every claim of fact on which evidence has been presented; but in this case findings on the basic facts, essential to a determination of the issue of whether or not this was a mortgage transaction, were required. 5 Moore, Federal Practice, ¶ 52.06(1) at 2659-61 (2d ed. 1951).

A crucial omission in the present case was the absence of any finding as to the value of the leasehold assigned. The appellant's real estate expert one Hanau, testified that the leasehold had a fair market value of $60,000. Appellee's counsel treated this as inconsequential and offered no evidence of his own. It stands uncontradicted. Moreover, Varveris, a shareholder and officer of the respondent, called by the petitioner as a witness and under questioning by the Referee, testified that Nedick's had offered $1400 per month, plus a percentage of the receipts, for a sub-lease of the store-restaurant. This was apparently corroborative. Perhaps the Referee did not believe the testimony, but the subject of value is nowhere mentioned in the memorandum. In th absence of a finding of some kind on so essen-

tial a fact, it can only be concluded that no consideration was given to it.

The importance of value in this case is obvious. If there was credible evidence that the leasehold at the time of the assignment had a fair market value of $60,000 or anything in the range of two or three times the sum received by the assignor, it is highly unlikely that the conveyance was understood or intended by the parties to be an outright sale. Moreover, if there was no personal promise or covenant on the part of the grantor to repay, a gross discrepancy between the money paid by the grantee and the value of the property conveyed would imply the type of mortgage transaction wherein the lender looked to the high value of the security to insure that he would be repaid.

In a New York case in which a warranty deed was given under circumstances which clearly showed it was initially for security purposes but which the grantee later sought to claim to be an obsolute conveyance, the court said, "It is not presumable that Lucilia Tracy intended to sell property worth $30,000 for $15,240." *Macauley* v. *Smith*, 132 N. Y. 524, 530, 30 N. E. 997 (1892); See also *Lade* v. *Thomas*, 108 Misc. 305, 177 N. Y. Supp. 513, aff'd 179 N. Y. Supp. 931 (1919); *Farmers' & Mechanics' Bank* v. *Smith*, 61 App. Div. 315 (3rd Dept.), 70 N. Y. Supp. 536 (1901); and *Mooney* v. *Byrne, supra*. See also *Conway's Executors and Devisees* v. *Alexander, supra; Peugh* v. *Davis, supra*, at 337; and Annot., 89 A. L. R. 2d 1040, § 2 and § 3 (1963).

Of course, wide discrepancy between the amount paid and the value of property conveyed has not in itself alone been held to be determinative of a security transaction. But in the circumstances of this case, the past connections and dealings of the parties and the arrangements made between them, as reflected in the unusual provisions of the documents which they executed, suggest so strongly the presence of a mortgage rather than the assignment and

option which they were called, that a finding of value of the property conveyed in an amount which is two or three times the amount of money paid by the assignee would point fairly conclusively to a security transaction.

Another matter which might be clarified on remand is the relation between the Bankrupt and the original assignee, Varveris Inc. Appellee's counsel argued that there was no pre-existing debt, but at one stage of the hearing, in trying to explain how the business relationship between the appellant and appellee developed, which ultimately culminated in the assignment, he asserted that the appellee originally put the fixtures in the store and took a chattel mortgage on them. He said that the appellee was "stuck in there" and was drawn in deeper and deeper until it had over $61,000 invested in the place and was trying to get out of it. Varveris, who appeared to control the original assignee, Varveris Inc., and its assignee, the appellee, also testified that he had put quite a few dollars into the store-restaurant which was Two Johns. Varveris seems also to have controlled Marathon Equipment Inc. which, on May 18, 1962, after a foreclosure, acquired all of the fixtures and equipment, formerly of Two Johns' store and restaurant.

Although Vlahakis, who controlled the appellant, had an interest in Two Johns, the record does not make it at all clear why the appellant was required to use its assets to pay off the chattel mortgages on the Two Johns' fixtures and equipment which were retained by Marathon Equipment Inc., or why appellee and its counsel were, in effect, arguing to the Referee justification for getting all it possibly could out of the appellant, unless there had been some pre-existing obligation or debt which appellant, 716 Third Avenue Holding Corp., owed through guarantying payment of debts owed by Two Johns to Varveris Inc., or for some other reason. Perhaps this can be clarified both in the evidence presented and in the findings, on rehearing.

There are strong motivations which induce parties to resort to a subterfuge of clothing a mortgage in the guise of an outright conveyance. The lender seeks thereby to avoid the time and expense of foreclosure proceedings and the possible loss of a substantial profit while his acquisition of title is delayed by a redemption period fixed by a court and if a borrower is in desperate financial circumstances, he will of necessity accede to the lender's demand; or where bankruptcy is in the offing, a friendly connivance between the incipient debtor and a lender might adopt such a form of transaction as a means of saving some of the debtor's property from going into the bankruptcy estate; or an apparently outright conveyance might also be used for a mortgage to escape the ½% recording tax on mortgages under § 250 and § 253, New York Tax Law.

The presence of these and perhaps other reasons, prompting the parties to adopt a form which does not truly reflect what they intend, make it necessary that, whenever this is an important issue in a case, the referee make findings relative to the presence or absence of the essential factors on which his determination is based.

Of the remaining questions raised on this appeal, those concerning the validity of the recording of the assignment under § 230 of the New York Real Property Law and the applicability of § 16 or § 20 of the New York Stock Corporation Law will largely be determined by the decision on the nature of the conveyance. The final point raised, which was that the assignment was without a fair consideration and rendered the Bankrupt insolvent, would need to be answered only in the event that the assignment was held to be an absolute conveyance, but it could only be answered after a finding of the value of the lease.

The decision of the District Court is reversed and the case is remanded for rehearing by the Referee.

APPENDIX B

(Opinion by District Court, Dated January 6, 1964, Affirming the Decision of the Referee in Bankruptcy)

FREDERICK van PELT BRYAN, District Judge:

This is a petition to review the order of a referee in bankruptcy which dismissed the petition of the trustee for a declaration that an assignment by the bankrupt of a leasehold was null and void, or, alternatively, for a declaration that the assignment was a mortgage and for a determination of the amount required for its redemption.

The bankrupt, 716 Third Avenue Holding Corp. was a New York corporation organized in 1952. In the spring of 1962, the bankrupt's sole asset was a long-term lease of a one-story building at Third Avenue and 45th Street in New York City. The building contained two stores and a restaurant; each was occupied under a separate sublease from the bankrupt. The restaurant was occupied by the Two Johns Restaurant Corp. (Two Johns), which then was in serious financial difficulty. Two Johns owed the bankrupt approximately $20,000 in rent and was in default in its payments for restaurant equipment purchased from Varveris Inc. and others under conditional sales and chattel mortgage agreements.

The imminent financial collapse of Two Johns threatened the bankrupt with the loss of the major part of its rental income and possible forfeiture of the leasehold to the fee owner. Under these circumstances, the bankrupt agreed on May 12, 1962 to assign the entire leasehold to Varveris Inc. in return for payments by the latter of $22,000.

The assignment agreement provided that the payments under it were to be applied as follows: $4,500 to pay delinquent real estate taxes on the property; $1,000 to pay the rent owed by the bankrupt to the fee owner for May, 1962;

$3,000 to provide additional security for the fee owner; $2,500 to pay attorney's fees, including the fee of the assignee's attorney; $5,000 to pay the conditional sales obligations to Two Johns; and $6,000 to be paid directly to the bankrupt. The agreement provided further that the bankrupt could repurchase the leasehold within nine months from the date of closing for $17,800 plus interest. If the bankrupt exercised this right, the assignee would account for any profits received during the period of its possession, and the bankrupt would make good any losses.

Prior to the closing on May 24, 1962, Varveris Inc. assigned its rights under the assignment agreement of May 12, to A.G.V. Associates, Inc. At the closing the bankrupt executed an assignment of its leasehold to A.G.V., and A.G.V. executed a reassignment to the bankrupt. Both instruments, together with other papers, were delivered to the attorneys for A.G.V., to be held by them in escrow under the terms of the May 12 agreement, and the various payments there provided for were made. On August 29, 1962, the attorneys for A.G.V. recorded the assignment in the New York City Register's office, but did not record the reassignment.

On June 28, 1962, an involuntary petition in bankruptcy was filed against the 716 Third Avenue Holding Corp., and on December 28, 1962 it was adjudicated a bankrupt. On February 8, 1963, and within the nine month period provided by the May 12 agreement, the trustee in bankruptcy notified A.G.V. of his intention to repurchase the leasehold, but made no tender of money, and in fact did not have on hand the amount that would have been required to repurchase under the terms of the agreement.

On February 18, 1963 the trustee brought a proceeding against A.G.V. before the referee in which he asked for a declaration: (1) that the assignment of the leasehold was a fraudulent conveyance under 11 U. S. C. § 107; (2) that

the recordation of the assignment was void under § 320, New York Real Property Law; (3) that the assignment was void for lack of the stockholder consent required by § 16, New York Stock Corporation Law; and (4) that the assignment was a mortgage rather than an absolute transfer. In connection with his fourth claim, the trustee asked the referee to determine the amount required to redeem the leasehold from mortgage and to order its sale for the purpose of raising that amount. During the hearing before the referee the second claim was dismissed, and at the conclusion of the hearing the remaining claims were also dismissed, all for failure of proof. The trustee has petitioned this court to review the order of the referee dismissing his petition. Jurisdiction is based on 11 U. S. C. § 67, sub. c.

[1, 2] Since the trustee's claims were tried before the referee in reverse order to that in which they were asserted in the petition, they will be considered in that order here. The fourth claim was for a declaration that the assignment was a mortgage and a determination of the amount necessary to redeem the mortgage. Section 320, New York Real Property Law, provides that "A deed conveying real property, which by any other written instrument, appears to be intended only as a security in the nature of a mortgage, although an absolute conveyance in terms, must be considered a mortgage * * *." Under New York law, the burden of establishing that a conveyance, absolute on its face, was intended as a mortgage is on the party alleging it, Charles T. Streeter Constr. Co. v. Kenny, 209 App. Div. 697, 205 N. Y. S. 611 (1st Dept. 1924), and he must present clear and convincing proof to that effect. Ensign v. Ensign, 120 N. Y. 655, 24 N. E. 942 (1890); Zivotovsky v. Max, 190 Misc. 1044, 75 N. Y. S. 2d 553 (Sup. Ct. Cortland Co. 1947), aff'd, 276 App. Div. 792, 92 N. Y. S. 2d 631 (3rd Dept. 1949). The referee dismissed this claim on the ground that the trustee had failed to sustain his burden of proof, and found that the assignment was intended to be a sale rather

than a mortgage. Unless this finding was clearly erroneous, it must be affirmed. In re Madelaine, 164 F. 2d 415 (2 Cir. 1947).

The evidence as to the true nature of the transaction was conflicting. John Vlahakis, president of the bankrupt, testified that the leasehold was assigned to A.G.V. as security for a loan. Several provisions in the agreement tend to support this claim: the agreement provided that part of the payment by the assignee would be used as additional security for the fee owner, an unusual provision for the bankrupt to accept if an absolute transfer were intended; the price at which the leasehold could be repurchased was substantially the same as the amount paid by A.G.V. for the benefit of the bankrupt; and, if the bankrupt exercised its option to repurchase, it would receive the profits or bear the losses resulting during the period of A.G.V.'s possession of the leasehold.

[3] On the other hand, there was no evidence that the bankrupt was indebted to the assignee prior to signing the agreement, and the agreement did not state that a debt was being created by the transaction. The only evidence that the payment by A.G.V. might have been intended to create a debt was the testimony by the bankrupt's president that the transaction was a loan. The credibility of this witness was for the referee to determine and, although the referee did not so state, it is fair to infer that he disbelieved the witness, as he was entitled to do, especially since the witness claimed to be a creditor of the bankrupt, and therefore, had a substantial interest in the success of the trustee's claim.

[4, 5] It is well settled in New York that a conveyance is not a mortgage unless a debt exists and the conveyance is intended to secure payment of the debt. Kraemer v. Adelsberger, 122 N. Y. 467, 25 N. E. 859 (1890); Bascombe v. Marshal, 129 App. Div. 516, 113 N. Y. S. 991 (2nd Dept. 1908); In re Exterior Street, 168 Misc. 575, 6 N. Y. S. 2d

110 (Sup. Ct. Bronx Co. 1938), aff'd, 255 App. Div. 767, 7 N. Y. S. 2d 643 (1938). Since the trustee failed to present sufficient proof of the existence of a debt, the referee's dismissal of the fourth claim, and his finding that an absolute conveyance was intended, was not clearly erroneous, and must, therefore, be affirmed.

[6] The third claim was for a declaration that the assignment was void for want of stockholder consent under § 16, New York Stock Corporation Law. That section permits a stock corporation to mortgage its property, and provides that "The consent to the execution of such mortgage * * * by the holders of not less than two-thirds of the total number of shares outstanding entitled to vote thereon * * * shall be required." This provision is not applicable, however, since the assignment was an absolute transfer rather than a mortgage.

Although the trustee, before the referee, based his third claim solely on § 16, he now urges that this claim is also supported by § 20, New York Stock Corporation Law. That section provides that

> "A stock corporation * * * may voluntarily sell, lease or exchange its property * * *; provided, however, that if such sale, lease or exchange is not made in the regular course of business of the corporation and involves all or substantially all of its property * * * such sale, lease or exchange shall not be made without the consent of either the holders of record of all its outstanding shares entitled to vote thereon given in writing without a meeting or the holders of record of two-thirds of its outstanding shares entitled to vote thereon obtained at a meeting of the stockholders called pursuant to section forty-five."

The referee found that the president of the bankrupt, Vlahakis, was also its sole stockholder, and that he consented to the assignment. The evidence on which this finding was

based consisted of a certificate for 25 shares of common stock of the bankrupt issued to Vlahakis in 1952, testimony by Vlahakis that he was the sole stockholder, and his representations to the same effect in the agreement of May 12, 1962 and in an affidavit signed on May 23, 1962.

The trustee attempted to prove that Vlahakis was not the sole stockholder by offering a certificate for 25 shares of common stock of the bankrupt which had apparently been endorsed over to John Vernazza by its original owner. Since there were no transfer tax stamps annexed to the certificate, however, the trustee conceded and the referee ruled that the certificate was inadmissible. Vlahakis then testified that the bankrupt's minute book, stock certificate book, and stock record book had all disappeared, whereupon the trustee offered the certificate as common law evidence that Vlahakis was not the sole stockholder. The referee again sustained an objection to the offer, apparently on the ground that the certificate was not the best evidence of stock ownership, and that sufficient foundation had not been laid for its admission as secondary evidence.

[7, 8] The trustee claims that since the bankrupt's stock record book had been lost, common law evidence of stock ownership, should not have been excluded. Under the Best Evidence Rule, secondary evidence is not admissible to prove the contents of a writing unless sufficient legal excuse is shown for failure to produce the original. Crane v. Bennett, 77 App. Div. 102, 79 N. Y. S. 66 (1st Dept. 1902), aff'd, 177 N. Y. 106, 69 N. E. 274 (1903). Where it appears that the original has been lost or destroyed, the party seeking to introduce secondary evidence must show that he has made a diligent search for the original, Kearney v. Mayor of New York, 92 N. Y. 617 (1883), and, if it appears that he is responsible for the loss he must also show that he is not chargeable with fraud or bad faith. West v. New York Central & Hudson River R.R. Co., 55 App. Div. 464, 67 N. Y. S. 104 (4th Dept. 1900); cf. People v. Betts, 272

App. Div. 737, 74 N. Y. S. 2d 791 (1st Dept. 1947), aff'd, 297 N. Y. 1000, 80 N. E. 2d 456 (1948).

[9] Thus the bare testimony of Vlahakis that the bankrupt's books had disappeared was not a sufficient foundation for the introduction of secondary evidence of their contents. There was no showing that a diligent search for the books had been made or of the circumstances under which they disappeared. For these reasons, the referee was correct in excluding the secondary evidence offered by the trustee to prove stock ownership.

The trustee also attempted, through the testimony of John Vernazza, to prove that Vlahakis was not the sole stockholder. Vernazza testified that he was a director of the bankrupt, that a certificate for 50% of the stock in the bankrupt was endorsed over to him, that it was held in escrow as security for a debt, that he was not in default in any of the payments for which the stock was held as security, and that on October 31, 1961 he attended and voted at a meeting of the directors and stockholders of the bankrupt.

[10-12] While this testimony might sustain a claim by Vernazza that he was the equitable owner of 50% of the stock of the bankrupt, it does not prove that the requirements of § 20 were not met. The consent required by § 20 is that of stockholders of record, and the trustee's proof did not establish Vernazza as a stockholder of record, nor did it establish that Vlahakis was not the sole stockholder of record. Since the burden of proving lack of compliance with the statute is on the party who asserts it, Frankel v. Tremont Norman Motors Corp., 21 Misc. 2d 20, 193 N. Y. S. 2d 722 (Sup. Ct. Bronx Co. 1959), aff'd 10 A. D. 2d 680, 197 N. Y. S. 2d 576 (1st Dept. 1960), aff'd 8 N. Y. 2d 901, 204 N. Y. S. 2d 146 (1960), and since the trustee failed to sustain this burden, the referee was correct in dismissing the third claim. It is unnecessary, therefore, to consider whether, as A.G.V. claims, stockholder consent was not required because the assignment was in the ordinary course of the bankrupt's business.

[13] The second claim was that A.G.V.'s recordation of the assignment as an absolute conveyance, without the simultaneous recordation of the instrument of defeasance, rendered the recordation void under § 320, New York Real Property Law. Since § 320 applies only to a deed which "appears to be intended only as a security in the nature of a mortgage," and since the referee's finding that the assignment was not intended as a mortgage has been affirmed, § 320 is inapplicable. It follows, therefore, that the dismissal of the second claim was not erroneous.

[14] The first claim sought to have the assignment declared void under the Fraudulent Conveyances Act, 11 U. S. C. §§ 107, sub. d(2) (a) and 107, sub. d(2) (c). Under § 107, sub. d(2) (a), a transfer by a debtor, within one year prior to the filing of a petition in bankruptcy against him, is fraudulent "if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent;" under § 107, sub. d(2) (c), such a transfer is fraudulent "if made or incurred without fair consideration by a debtor who intends to incur or believes that he will incur debts beyond his ability to pay as they mature."

No evidence whatsoever was presented to support a claim that the bankrupt intended to, or believed it would incur debts beyond its ability to pay by reason of the assignment of its leasehold. The assignment was, therefore, not shown to be fraudulent under § 107, sub. d(2) (c).

[15] With respect to the claim based on § 107, sub. d(2) (a), the referee found that the bankrupt was not rendered insolvent by virtue of its assignment of the leasehold. Under the Bankruptcy Act, a person is insolvent whenever his liabilities are greater than the fair value of his assets. 11 U. S. C. § 1(19); Tumarkin v. Gallay, 127 F. Supp. 94 (S. D. N. Y. 1964). The evidence concerning the bankrupt's financial condition at the time of the assignment was less than conclusive. John Vlahakis, president

of the bankrupt testified initially that he was not familiar with the corporation's financial position. He later testified in response to leading questions that the assignment did not bring the bankrupt sufficient money to pay all its debts, but was unable to support this conclusion by giving a detailed account of the assets and liabilities of the bankrupt.

[16] The referee's remarks at the conclusion of Vlahakis' testimony indicate his belief that any evidence of insolvency that had been presented had come from the attorney for the trustee rather than from the witness. The referee was plainly justified in so concluding. In the light of this conclusion, and in the absence of any detailed evidence of the bankrupt's assets and liabilities, it was not clearly erroneous for the referee to find that the assignment did not render the bankrupt insolvent.

Since the trustee failed to establish any of his claims, the referee was correct in dismissing the petition, and his order of dismissal will be and is hereby affirmed.

It is so ordered.

APPENDIX C

(Order of Honorable Herbert Loewenthal, Referee in Bankruptcy, Dated March 25, 1963)

A petition having been filed herein by Jeremiah F. Cross, the trustee of the above named bankrupt, upon his application for an order (1) declaring the bankrupt's assignment of a certain lease of realty situated at 716 Third Avenue, Manhattan, to A.G.V. Associates, Inc. to be null and void upon the ground that the assignment was without fair consideration, and (2) adjudging that the assignment of the lease was in the nature of a mortgage and that the recordation of the assignment of the lease as an absolute transfer is null and void, and (3) adjudging that the assignment of the lease was without the required consent of the stockholders of the bankrupt and is null and void, and (4) adjudging the sum of money required to be paid to recapture the lease and authorizing and directing the trustee to sell the same free of the claim or lien of the respondent, its claim or lien to be transferred to the proceeds of such sale, and an order to show cause having been issued thereon, dated February 18, 1963, and A.G.V. Associates, Inc. having served and filed an amended answer to the trustee's petition, and the issues raised thereby having been heard by the undersigned Referee in Bankruptcy on the 25th day of February, 1963 and the 1st day of March, 1963, and the trustee's third claim having been dismissed on motion during the hearings, and the remaining first, second and fourth claims having been dismissed on March 11, 1963 on motion after the conclusion of the hearings, and upon the dismissal of the trustee's claims, and on the findings of fact and conclusions of law made and filed herein under date of March 25, 1963, and after hearing Jacob Oliner, Esq., attorney for the trustee, in support of the trustee's application, and Argiriou & Finkel, Esqs., Attorneys for A.G.V. Associates, Inc., the respondent herein, by Samuel Newfield, Esq., of

counsel, in opposition thereto, and due deliberation having been had,

Now, upon the trustee's said petition and the amended answer thereto, upon all the evidence adduced at the said hearings, and on the findings of fact and conclusions of law dated March 25, 1963, and upon the decision of the undersigned, and on motion of Argiriou & Finkel, attorneys for the respondent A.G.V. Associates, Inc., it is hereby

ORDERED, ADJUDGED AND DECREED:

1. That A.G.V. Associates, Inc. is the owner of the lease of the realty situated at 716 Third Avenue, Manhattan, by virtue of the Bankrupt's outright sale and assignment thereof to it.

2. That said assignment of the lease is not a mortgage.

3. That the bankrupt's option to repurchase the lease and the trustee's right thereunder have expired, and it is

ORDERED that the Trustee's petition be and the same hereby is dismissed in every respect.

Dated: New York, New York,
March 25, 1963.

s/ HERBERT LOEWENTHAL,
Referee in Bankruptcy.

APPENDIX D

(Findings of Fact and Conclusions of Law, of Honorable Herbert Loewenthal, Referee in Bankruptcy, Dated March 25, 1963)

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

In the Matter

—of—

716 THIRD AVENUE HOLDING CORP.,

Bankrupt.

In Bankruptcy
No. 62-B-483

FINDINGS OF FACT and CONCLUSIONS OF LAW.

A petition having been filed by Jeremiah F. Cross, the Trustee herein, verified Febr[illegible]ry 18, 1963 upon his application to this Court requiring the Respondent, A.G.V. Associates, Inc., to show cause why an order should not be made (1) declaring the Bankrupt's assignment of a certain leasehold to the Respondent to be null and void upon the ground that the assignment was without fair consideration and (a) the bankrupt was thereby rendered insolvent and (b) it incurred thereby an obligation beyond its ability to pay; and (2) adjudging that the assignment of the leasehold was in the nature of a mortgage and that the recordation of the assignment thereof as an absolute transfer is null and void; and (3) that the assignment of the leasehold was without the required consent of the stockholders of the bankrupt

and is null and void; and (4) adjudging the sum of money required to be paid to re-capture the leasehold and authorizing and directing the Trustee to sell the leasehold free of the claim or lien of the Respondent, its claim or lien to be transferred to the proceeds of such sale, and an order to show cause dated February 18, 1963 having been issued upon the Trustee's said petition, and the Respondent having filed an amended answer denying the material allegations thereof and containing an affirmative defense, and evidence upon the issued raised by the Respondent's amended answer having been heard by the undersigned Referee in Bankruptcy in charge of this proceeding on the 25th day of February, 1963 and the 1st day of March, 1963, and the Trustee's third claim having been dismissed on motion during the hearings, and upon the motion made on behalf of the Respondent at the conclusion of the hearing to dismiss the other claims alleged in the Trustee's petition, and upon the decision of the Court made on March 11, 1963 granting the motion made on behalf of the Respondent to dismiss the Trustee's first, second and fourth claims, the Court makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. The bankrupt sold and assigned to the Respondent its Lease (Petitioner's Exhibit 3) covering premises known as 716 Third Avenue, City of New York, for the sum of $22,000.00 pursuant to the terms and conditions of an Agreement dated May 12, 1962 (Petitioner's Exhibit 1) entered into between the Bankrupt and Respondent's assignor Varveris, Inc., and the Respondent paid the price as provided in the Agreement.

2. The Agreement dated May 12, 1962 (Petitioner's Exhibit 1) contained an option to the Bankrupt (paragraph 3) to repurchase or recapture the Lease (Petitioner's Exhibit 3) for a stated price, which provided that such option was to be exercised on or before February 23, 1963.

3. On June 28, 1962 an involuntary petition in bankruptcy filed against the Bankrupt, it was duly adjudged bankrupt on December 28, 1962 and the Trustee qualified in said capacity on January 29, 1963.

4. The Bankrupt did not, prior to its bankruptcy, exercise option to repurchase the Lease.

5. The Trustee did not, during the time permitted by the agreement and/or the time granted by the Bankruptcy Act (Section 70(b)) make a tender of any sum to repurchase the Lease, nor did the Trustee, during such period have on hand the sum of money that would have been required to repurchase the Lease.

6. The Bankrupt was not rendered insolvent by virtue of its sale of the Lease to the Respondent.

7. Neither the Agreement (Petitioner's Exhibit 1) nor the Assignment of the Lease (Petitioner's Exhibit 3) nor any of the other exhibits received in evidence upon the hearings, express the existence or creation of a debt or obligation on the part of the Bankrupt to the Respondent by reason of its sale of the Lease to the Respondent.

8. No promissory note or other evidence of debt was given by the Bankrupt to the Respondent in connection with the Bankrupt's sale of the Lease to the Respondent.

9. John Vlahakis, the Bankrupt's officer who executed the Agreement (Petitioner's Exhibit 1) and the Assignment of Lease (Petitioner's Exhibit 7) was the owner and holder of all the Bankrupt's issued and outstanding shares of stock. (Representation to such effect in Agreement, paragraph 7, Petitioner's Exhibit 1 and Affidavit of John Vlahakis, Respondent's Exhibit A), consented to the Bankrupt's sale and assignment of the Lease by his participation in the transaction.

10. The sum of money which was required to be paid to repurchase and recapture the Lease (Petitioner's Exhibit 3) was $26,912.56 (Petitioner's Exhibits 12 and 13).

CONCLUSIONS OF LAW

1. The express terms and conditions of the Agreement (Petitioner's Exhibit 1), implemented by the Assignment of Lease (Petitioner's Exhibit 7) constituted an outright sale and assignment of the Lease (Petitioner's Exhibit 3) for the price of $22,000.

2. The transaction constituted an assignment of the Lease (Petitioner's Exhibit 3) with an option to the Bankrupt to repurchase it upon the price, terms and conditions set forth in the Agreement (Petitioner's Exhibit 1).

3. No debt or obligation on the part of the Bankrupt to the Respondent existed or was incurred or created before or at the time or by reason of the transaction by which the Bankrupt sold and assigned the Lease to the Respondent.

4. Neither the Bankrupt nor the Trustee duly elected to exercise the option contained in the Agreement (Petitioner's Exhibit 1) during the time it could be exercised pursuant to its terms and conditions or within the time it could be exercised under the Bankruptcy Act (Section 70(b)).

5. The Trustee's proof failed to establish that a debt or obligation, either pre-existing or incurred or erected by the Bankrupt to the Respondent in connection with the Bankrupt's Assignment of the Lease to the Respondent, and no mortgage was created as a matter of law, and the Assignment of Lease did not constitute security for any debt or obligation.

6. The transaction was an assignment of the Lease with an option to the Bankrupt to repurchase it upon the price, terms and conditions set forth in the Agreement.

7. The assignment of Lease was absolute on its face and to establish its character as a mortgage, as contended by the Trustee, he was required but he failed to furnish clear, unequivocal and convincing proof of an underlying debt or obligation.

8. The Trustee, the movant herein, failed to meet his burden of proof upon any of the claims set forth in his petition for relief.

9. The Trustee failed to establish his claim that the transaction constituted a mortgage to secure a debt.

10. That an order be made dismissing the Trustee to petition in every respect.

Dated: New York, New York,
March 25, 1963.

s/ HERBERT LOEWENTHAL,
Referee in Bankruptcy.

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Supreme Court of the United States

OCTOBER TERM 1964

No. 1018/1964

A. G. V. ASSOCIATES, INC.,

Petitioners,

against

JEREMIAH F. CROSS, Trustee of 716 Third Avenue Holding Corp., Bankrupt,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM 1964

No. 1018/1964

A. G. V. ASSOCIATES, INC.,

Petitioners,

against

JEREMIAH F. CROSS, Trustee of 716 Third Avenue Holding Corp., Bankrupt,

Respondent.

RESPONDENT'S BRIEF

POINT ONE

No appeal lies to the Supreme Court from the order sought to be reviewed.

The order of the Circuit Court of Appeals for the Second Circuit reversed and remanded for a rehearing and further findings by the Referee in Bankruptcy. The Court held that the Referee had failed to make the necessary findings of fact on the "key issue" of the case (A-8).* The order of remand is not a final order from which an appeal could lie.

Slaker v. *O'Connor*, 278 U. S. 188, 189; 49 S. Ct. 158, 159; 73 L. Ed. 258;

City of Chicago v. *Atchison*, 375 U. S. 77; 78 S. Ct. 1063;

South Carolina Electric & Gas Co. v. *Fleming*, 351 U. S. 901; 76 S. Ct. 692; 100 L. Ed. 1439.

* References are to pages of Petitioner's Appendix.

POINT TWO

A. The Referee failed to make the necessary findings of fact for his holding that no security transaction was intended.

B. The Circuit Court of Appeals properly remanded for further findings.

The gist of petitioner's argument is that

> "The factual findings of the trier of facts, especially where affirmed by the District Court, must be upheld." (p. 6 of petitioner's brief)

Thus, petitioner suggests that the Circuit Court of Appeals has in some way *upset* or modified the findings of the Referee in remanding the cause. However, the Court of Appeals has not disturbed any of the findings of the Referee but found that the Referee failed to make

> "findings on the basic facts essential to a determination of the issue of whether or not this was a mortgage transaction." (A-8)

The Court held that the Referee

> "considered the absence of an express written statement of a debt completely determinative and that it was unnecessary to deliberate on the evidence on the key issue of the case . . . " (A-8)

and that, therefore, the Referee labored under a misunderstanding of the law. The Court of Appeals had a duty under these circumstances to remand for further findings. As this Court said in *Guzman* v. *Pichardo*, 369 U. S. 698, 82 S. Ct. 1095, the very case relied on by petitioner:

> "If we were convinced, as was the Court of Appeals, that the trial court's action was colored by a misunder-

standing of such legal principles, we would have to remand, as the Court of Appeals should have, for further findings by the trial court on the credibility of the owner's witness (Citations)."

In this case the Court of Appeals properly remanded for further findings.

CONCLUSION

The petition for a writ of certiorari should be dismissed, in the alternative, denied for lack of merit.

Respectfully submitted,

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